

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

ORIGINAL

77-2075

United States Court of Appeals

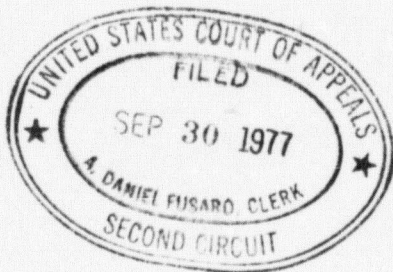
For the Second Circuit

ALBERT VICTORY,
Petitioner-Appellee,
against

ROY BOMBARD, as Superintendent of
Greenhaven Correctional Facility,
Respondent-Appellant.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF PETITIONER-APPELLEE



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TABLE OF CONTENTS

QUESTIONS PRESENTED.....	1
STATUTES INVOLVED.....	2
STATEMENT OF FACTS.....	3
<u>ARGUMENT</u>	
<u>POINT I</u>	
THE DISTRICT COURT PROPERLY GRANTED THE PETITION ON THE GROUND THAT DUE PROCESS WAS DENIED BY THE REFUSAL OF THE TRIAL JUDGE TO EXPLAIN THE MEANING OF AN ELEMENT OF FELONY MURDER IN THE FACE OF REQUESTS BY COUNSEL AND AN INQUIRY BY THE JURY DEMONSTRATING ITS CONFUSION.....	18
<u>POINT II</u>	
VICTORY'S RIGHT OF CONFRONTATION WAS DENIED BY THE TRIAL COURT'S REFUSAL TO PERMIT IMPEACHMENT OF THE PRINCIPAL PROSECUTION WITNESS.....	30
<u>POINT III</u>	
DUE PROCESS REQUIRES THAT THE PROSECUTION DISPROVE THE AFFIRMATIVE DEFENSE TO FELONY MURDER BEYOND A REASONABLE DOUBT.....	45
CONCLUSION.....	56

TABLE OF AUTHORITIES

CASES

Banks v. United States, 267 F.2d 535 (1959).....	17
Barnes v. United States, 412 U.S. 837 (1973).....	55
Brookhart v. Janis, 384 U.S. 1 (1966).....	44
Chambers v. Mississippi, 410 U.S. 284 (1973).....	33

Chesney v. Robinson, 403 F.Supp. 306 (Conn. 1975) <u>aff'd.</u> 538 F.2d 308 (2d Cir. 1976), <u>cert.</u> <u>denied</u> 429 U.S. 867.....	32
Davis v. Alaska, 415 U.S. 308 (1974).....	32,33,44
Franklin v. Conway, 546 F.2d 579 (4th Cir. 1976).....	55
Henderson v. Kibbe, ____ U.S. ____, 52 L.Ed.2d 203 (May 16, 1977).....	28,29
Jaffke v. Dunham, 352 U.S. 280 (1957).....	17
Jencks v. United States, 353 U.S. 657 (1957).....	32
Lambert v. California, 355 U.S. 225 (1957).....	49
Leary v. United States, 395 U.S. 6 (1969).....	55
Leland v. Oregon, 343 U.S. 790 (1952).....	46,49
Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965)...	53
Morrisette v. United States, 342 U.S. 246 (1952).....	49
Mullaney v. Wilbur, 421 U.S. 684 (1975).....	16,45,46 47,49,56
Patterson v. New York, ____ U.S. ____, 53 L.Ed.2d 281 (June 17, 1977).....	45,46,47 50,56
People v. Bornholdt, 33 N.Y.2d 75 (1973), <u>cert.</u> <u>denied</u> , <u>sub nom.</u> <u>Victory v. New York</u> , 416 U.S. 905 (1974).....	16,47,49, 50
People v. Elling, 289 N.Y. 419 (1943).....	52
People v. Joyner, 26 N.Y.2d 106 (1970).....	19
People v. Munoz, 9 N.Y.2d 51 (1961).....	49
People v. Patterson, 39 N.Y.2d 288 (1976), <u>aff'd.</u> ____ U.S. ____, 53 L.Ed.2d 281 (1977).....	46
People v. Rosario, 9 N.Y.2d 286 (1961).....	30
People v. Ryan, 263 N.Y. 298 (1934).....	52
People v. Sandoval, 34 N.Y.2d 371 (1974).....	53
People v. Sobieskoda, 235 N.Y. 411 (1923).....	52

People v. Wood, 8 N.Y.2d 48 (1960).....	49
Rivera v. Delaware, 429 U.S. 877 (1976).....	46, 49
Smith v. California, 361 U.S. 147 (1959).....	49
Smith v. Illinois, 390 U.S. 129 (1968).....	44
Speiser v. Randall, 357 U.S. 513 (1958).....	53
Tot v. United States, 319 U.S. 463 (1943).....	53
United States v. Cordova, 421 F.2d 471 (9th Cir. 1970), <u>cert. denied</u> , 398 U.S. 941.....	31
United States v. Mancuso, 420 F.2d 556 (2d Cir. 1970).....	49
United States v. Palumbo, 401 F.2d 270 (2d Cir. 1968).....	53
United States v. Standard Oil Company, 316 F.2d 884 (7th Cir. 1963).....	31
United States ex rel. Santiago v. Vincent, 423 F.Supp. 103 (S.D.N.Y. 1976), <u>aff'd</u> . 553 F.2d 94 (2d Cir. 1977).....	44
In re Winship, 397 U.S. 358 (1970).....	15, 45, 46
Yee Hem v. United States, 268 U.S. 178 (1925).....	55

STATUTES

New York Penal Law:

\$20.00.....	51
\$25.00.....	3
\$30.05.....	6
\$120.05.....	7
\$125.25.....	2, 14
\$205.05.....	9
\$205.10.....	8, 9
\$265.01-265.03.....	51
18 U.S.C. §3500.....	30
Homicide Act of 1957, 5-6 Eliz. 2, c. 11.....	48

OTHER AUTHORITIES

Ashford and Risinger, Presumptions, Assumptions, and Due Process in Criminal Cases, 79 Yale L.J. 165 (1969).....	54
Byrn, Homicide under the Proposed New York Penal Law, 33 Fordham L. Rev. 193 (1964).....	48
Gegan, Criminal Homicide in the Revised New York Penal Law, 12 N.Y. Law Forum 565 (1966).....	48
Hall, General Principles of Criminal Law (2d Ed. 1960).....	48
McCormick, Evidence (2d Ed.) §34.....	31
Model Penal Code, Tent. Draft No. 9 (1959).....	48
Preveser, The English Homicide Act, 57 Colum. L. Rev. 624 (1957).....	48
Wharton's Criminal Evidence (13th Ed.) §470.....	31
Wigmore on Evidence (Chadbourn Rev. 1970) §1042.....	31

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BRIEF OF PETITIONER-APPELLEE

QUESTIONS PRESENTED

1. Was due process denied a defendant in a felony murder trial by the judge's refusal to explain the meaning of an element of the crime despite requests by counsel and a question from the jury which indicated that it was seriously confused on the issue?
2. Was the right of confrontation denied by the trial judge's rulings which prevented impeachment of a prosecution witness's testimony on a crucial fact?
3. Was due process violated by the New York statutory scheme which provides an affirmative defense to felony murder but shifts the burden of persuasion to the defendant?

STATUTES INVOLVED

New York Penal Law §125.25 at the time of petitioner's trial and appeals in the state courts, provided in pertinent part:

"A person is guilty of murder when:

* * *

3. Acting either alone or with one or more other persons, he commits or attempts to commit robbery, burglary, kidnapping, arson, rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, escape in the first degree, or escape in the second degree, and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants; except that in any prosecution under this subdivision, in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:

(a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and

(b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

(c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

(d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury."

New York Penal Law §25.00 provides:

"1. When a "defense," other than an "affirmative defense," defined by statute is raised at a trial, the people have the burden of disproving such defense beyond a reasonable doubt.

2. When a defense declared by statute to be an "affirmative defense" is raised at a trial, the defendant has the burden of establishing such defense by a preponderance of the evidence."

STATEMENT OF FACTS

Introduction

At about 1:00 a.m. on the rainy night of October 7, 1968, Patrolman John Varecha, on stationary foot duty on Fifth Avenue near 54th Street in New York City, observed an automobile driving East on 54th Street going through the red light at the intersection. He commandeered a taxi and followed the car which stopped in front of Arthur Discotheque at 154 East 54th Street (684-695).* Albert Victory, the driver, and Robert Bornholdt, an acquaintance, had just emerged from the car and were going up the steps to enter the discotheque. Patrolman Varecha stopped Victory and asked for his driver's license and registration. Within a few minutes a scuffle ensued, during the course of which Bornholdt pulled out a pistol and shot the patrolman a number of times, wounding him fatally.

* Numbers in parentheses without prefix or suffix refer to the trial testimony in the record on appeal in the New York courts. Numbers preceded by "VD" are to the voir dire of the jury, also contained in the state court record. Those followed by "A" are to the papers at the beginning of Vol. 1 of the state court record. Numbers followed by "a" are to the appendix in this Court.

Both Victory and Bornholdt were indicted, Victory for felony murder, and Bornholdt for both felony murder and intentional murder. At trial before Hon. Irwin D. Davidson the jury returned verdicts of guilty on all charges and both men were sentenced to terms of 25 years to life.

The Prosecution Case

The principal witnesses at the trial were Francisco Garcia, his wife Donna, his niece Theresa Gentry, and their friend Maureen LaGuardia. They were leaving the discotheque when the incident began.

Their testimony was that the officer asked who had been driving the car (LaGuardia 841-842), and asked Victory for his drivers' license and registration (D Garcia 1330, Gentry 1464). Victory, spinning the automobile keys in his hand (F Garcia 1032-1034, D Garcia 1331, Gentry 1464) flippantly replied that they hadn't been driving a car (LaGuardia 841-842, F Garcia 1035), but had come by truck (LaGuardia 843, Gentry 1464-1465). The officer blocked the entrance to Arthur's and grabbed Victory's arm (LaGuardia 843, Gentry 1468). Victory, the witnesses stated, then grabbed the policeman's raincoat (LaGuardia 843, D Garcia 1334), "picking him up" and "was shaking him up" (F Garcia 1039, Gentry 1470-1471). He said to the officer, "Don't you touch me" (LaGuardia 843, F Garcia 1039, D Garcia 1334, Gentry 1468-1469). The officer, having purportedly just been picked up and shaken by Victory, started walking west on the sidewalk and made the

inexplicably mild threat, "If you don't give me the registration, your license, I'll tow your car away" (F Garcia 1088) which he repeated after more pushing and scuffling (F Garcia 1114, D Garcia 1419-1420).

On the sidewalk Victory attempted to calm the situation. Throughout the incident he kept telling the policeman, "Listen, I want to help you * * * I don't want any trouble" (LaGuardia 854-855, 856, 976, 989) and urged him to "give us a break" (F Garcia 1036, 1052, 1089). Victory told Bornholdt not to get involved in the discussion: "Stay out of this. I'll take care of this" (F Garcia 1042, 1121, 1232); "Just stay over there. * * * I'm talking to the cop, I'm taking care of it" (D Garcia 1337, 1369, 1431); "Don't worry about it, I'll take care of it" (Gentry 1472), and told Bornholdt to go inside (1232-1233).

Mr. and Mrs. Garcia testified that Victory kned the officer in the groin, causing him to react in pain (F Garcia 1042-1045, 1122, D Garcia 1338-1339, 1369). The officer struck Victory and Bornholdt with his nightstick (F Garcia 1046-1049, 1127, 1131, D Garcia 1342-1343), causing both to bleed profusely (F Garcia 1049, 1051, 1132, 1235), and knocking Bornholdt to the ground (F Garcia 1154). Pa. State Const. Varecha drew his revolver and told the men they were under arrest (F Garcia 1047), and ordered them into an alleyway with their hands against the wall (F Garcia 1134). Victory complied (La Guardia 869, F Garcia 1052, 1136, 1241, D Garcia 1435) but Bornholdt did not (F Garcia 1052).

Victory yelled to Francisco Garcia to "Get a cop; get a cop. This guy is crazy" (F Garcia 1192, 1242, 1280). Shots were heard (F Garcia 1059, 1251-1254, D Garcia 1346, Gentry 1477, LaGuardia 873-874). Mr. Garcia saw the flash from the last shot coming from Bornholdt who was standing over the patrolman with a gun (1060-1061). Bornholdt ran from the scene (F Garcia 1060, Det. Randolph Jurgensen 1526), and later Victory also left (Det. Randolph Jurgensen 1527). Both were apprehended within a short time (Victory: 1528-1529; Bornholdt: 1662). A gun was found in Bornholdt's possession (1662-1663), which ballistics testimony established to have fired the one bullet removed from Patrolman Varecha's body (1927) and the eight shell casings found at the scene of the shooting (1917-1918).

Bornholdt's Mental State

Prior to the trial Bornholdt was found competent to stand trial (94A) and his defense of insanity was unsuccessful. There was no question, however, but that Bornholdt was deeply disturbed and clinically psychotic.* The prosecution psychiatrist at the pre-trial hearing diagnosed him as suffering from schizophrenia in a remissive state (347, 374-376) and described his constant assaults on other patients while under pre-trial observation at Bellevue Hospital, which required his being placed in isolation

* There is nothing inconsistent between the findings that he was legally competent and not insane, and a clinical diagnosis of psychosis. The latter does not necessarily affect his capacity to know the "nature and consequences of such conduct" or that "such conduct was wrong" Penal Law §30.05.

(347, 380-381). Bornholdt had even attacked an examining psychiatrist (379). During his Bellevue stay and throughout the trial he was under heavy tranquilization (344-357, 425-426), despite severe toxic side effects, to prevent decompensation (a flare-up of the psychosis) (373-374).

Expert defense testimony at trial confirmed the diagnosis of paranoid schizophrenia(2044, 2299) and concluded that Bornholdt was suffering from the disease on October 7, 1968 (2045, 2307-2308), and that it was characterized by decompensation under pressure, with unpredictable violent behavior (2079). He had delusions that people laughed at him, and called him a "punk" or a "fag" (2093, 2312). He was quoted as saying. "They lie about me. If they can prove I'm a fag they can electrocute me. They kill fags" (2095). Bornholdt had to keep fighting to prove he was not a homosexual (2312-2313).*

The Theory of the Prosecution

Petitioner's conviction for felony murder rested on an intricate prosecution theory: his alleged kneeing of Patrolman Varecha was an assault in the second degree, a felony (Penal Law §120.05 subd. 3 -- causes physical injury to a peace officer with the intent to prevent him from performing a lawful duty). Varecha's arrest of Victory and Bornholdt (who joined in the

* Ten days after sentence Bornholdt was committed to Dannemora State Hospital. Counsel is advised that he was later transferred to Matteawan State Hospital where he remained confined for many years.

assault) was therefore for a felony. Escape from that felony arrest was therefore escape in the second degree (Penal Law §205.10 subd. 2) which is one of the predicate felonies specified in the felony murder statute. The shooting of the officer was in furtherance of that escape.

Victory's Defense

Petitioner's defense was based on four lines of attack. First, he tried to show that at no time was he an accomplice of Bornholdt in an escape, the shooting, or any other criminal act. Second, he tried to establish that he had not kicked the patrolman in the groin, an essential element in the prosecution's case. Third, he attempted to place squarely before the jury the issue of the timing of the escape: if his intent to escape had not been formed until after the shooting, then the shooting could not have been "in the course of and in furtherance of" the escape. Fourth, he sought to establish the statutory affirmative defense to felony murder.*

A. Victory's Participation in Bornholdt's Acts

Victory could not be guilty of the felony murder unless he joined with Bornholdt in an escape or attempted escape. There was no evidence of any communication between the two indicating an agreement to try to escape. The only evidence was to the

* Victory asserts that he did not knee Officer Varecha in the groin or otherwise assault him (7a) and that the true facts would have established the affirmative defense to felony murder (8a).

contrary: when Victory was engaged with Patrolman Varecha his only words to Bornholdt were "Stay out of this", "I'm taking care of this". If Bornholdt was attempting or planning an escape, there is no basis for an inference that Victory was his accomplice.

B. The Kneeing of Officer Varecha

A vital link in the prosecution's felony murder charge was proof that Albert Victory kned Patrolman Varecha in the groin. Unless that felonious act was proved, the alleged escape would not have been from an arrest for a felony, and could not be escape in the second degree, Penal Law §205.10. An escape after an arrest for an offense less than a felony would have constituted only escape in the third degree, a misdemeanor, Penal Law §205.05, and therefore could not constitute the predicate felony for the felony murder conviction.

Only two witnesses testified to the kneeling incident, Francisco Garcia and Donna Garcia. Mrs. Garcia, on direct examination, testified that she saw the assault occur (1338-1339). On cross-examination, however, she could not recall whether the officer's back was toward her or whether he was facing her, and similarly whether petitioner was facing or turned away from her (1430-1431). Other testimony of Mrs. Garcia casts doubt on the reliability of her observations: she did not see petitioner or Bornholdt bleeding (1375-1378); she saw no pushing of petitioner by the officer (1430) and did not see the patrolman's gun during the incident (1435).*

* Theresa Gentry did not testify to seeing the kneeling of Patrolman Varecha, but only described "kicking and punching" (1473). Maureen LaGuardia testified that she did not see Victory strike the officer (1009-1010).

Francisco Garcia's testimony that petitioner grabbed the patrolman by the lapels and kneed him in the groin "very hard", accompanied by a courtroom re-enactment of the assault (1042-1045), was therefore the only direct evidence of the act which to the jury might have found persuasive.

At the station house, shortly after the incident, Francisco Garcia gave a statement to Detective Donald Byrne, who wrote down "all of the answers and all of the questions" (according to defense counsel's representation of a conversation with the detective (2499)). The detective's notes of the statement were marked People's Exhibits 25 and 26 for identification (17a, 22a). Mr. Garcia testified that Exhibit 25 fairly and accurately represented what he told Detective Byrne (1179). Almost immediately afterward Garcia gave another statement to an assistant district attorney, Kenneth Dannett, in a stenographically recorded set of questions and answers (1273-1275), the transcript of which was marked People's Exhibit 28 for identification (24a).

The defense sought to establish that in neither the statement given to Detective Byrne nor the one to the assistant district attorney did Mr. Garcia mention that he had seen petitioner knee the officer in the groin.* The trial court would not permit this

* The impeachment would have been particularly significant in view of the testimony of the Associate Medical Examiner who conducted the autopsy and found no bruises or other evidence of trauma to the officer's genitals or thighs (1865, 1895, 1897-1898).

to be done in Mr. Garcia's cross-examination (1187-1188, 1299-1300), nor would it permit the introduction of the statements through Mr. Garcia (1179-1181, 1301-1302), through Detective Byrne (2498-2500) or through the stenographer who took the statement given to the assistant district attorney (2475-2482) and would not permit the defense to call the assistant district attorney for the same purpose (2484-2486).

C. The Failure of the Court to Instruct the Jury on the Timing of the Intent to Escape

Because there could be no felony murder unless the shooting of Patrolman Varecha was "in the course of and in furtherance of" the escape, petitioner tried to place before the jury the elementary proposition that there could be no conviction unless his intent to escape was formed prior to or contemporaneously with the shooting. This was particularly important because there was no testimony of any communication between petitioner and Bornholdt indicating a joint plan to escape, and the evidence strongly suggested that Victory had no thought of leaving the scene until after the shooting, when Bornholdt had already fled and off-duty police emerged from Arthur's with guns drawn and gave chase.

Petitioner therefore requested that the jury be instructed:

"In order for you to convict the accused, Albert Victory, of the crime of felony murder, you must find the prosecution has proven beyond a reasonable doubt that prior to or contemporaneous with the killing, Victory formed an intent to escape from the custody of the Patrolman and attempted to so escape, and that the killing occurred in the course of and in furtherance of that attempted escape.

"If the accused, Albert Victory, formed an intent to escape for the first time following the shooting and then fled from the scene of the shooting, he would not be guilty of felony murder and you must find him not guilty.

"If you have a reasonable doubt whether, prior to the shooting, Victory intended to escape from the custody of the Patrolma, you must acquit him of felony murder, the only crime charged in this indictment (3489-3490).

The request was declined (2954). Instead the court charged in the bare words of the statute that the prosecution must show that the death was caused by a defendant "in the course of and in furtherance of" the crime of escape (2969, 3053, 3057), or slight variants of those words: "while committing" (but omitting "in furtherance of") (3053), "in the course of" (omitting "in furtherance of") (3061). In two instances the court added the statutory words "or the immediate flight therefrom" (3053, 3057), despite the fact that the underlying felony was the alleged escape.

The jury was obviously perplexed. It returned twice for further instructions on the law of escape (3102, 3135), and counsel again requested an instruction linking the time of the shooting to the escape (3110, 3148-3149).

At 9:19 p.m. on the second day of deliberations the jury announced that it had found Bornholdt guilty of common law murder, but was unable to reach a verdict on the felony murder charges (3164). The court directed further deliberations. At 9:56 p.m.

(3173), the jury requested an answer to the question:

"As a matter of law, does the fact of flight after the shooting itself establish escape in the second degree after an arrest has been made for felony assault?" (3174).

The court's response was largely a repetition of its earlier instructions, plus the following:

"Now, flight after a shooting in and of itself does not necessarily constitute escape in the second degree. However, flight after a lawful arrest by a policeman for the felony of assault in the second degree does constitute the crime of escape in the second degree, whether that flight takes place before or after the shooting" (3177-3178; emphasis supplied.)

One again counsel excepted because the court failed to tie the timing of the escape to the shooting in terms of the element of felony murder:

"Your Honor did not tell that jury that, in determining whether or not there is a felony murder, they must consider whether or not the escape took place at the same time that the homicidal act took place; and Your Honor has definitely left an impression with that jury that the flight after the homicidal act would be sufficient for purposes of making out a felony murder. That is not the law, and I would take an exception to the instructions given by the Court to the jury." (3180)

The jury retired at 10:27 p.m. (3180) and at 11:38 p.m. (3181), barely an hour later, returned with a verdict finding Victory guilty of felony murder.

D. The Affirmative Defense

At trial Victory sought to establish the affirmative defense to felony murder, Penal Law §215.25 subd. 3 by means of evidence adduced from prosecution witnesses* and through the testimony of Bornholdt.

Victory moved unsuccessfully for a severance in the expectation that Bornholdt would be willing to testify as a defense witness at a trial in which Bornholdt himself was not a defendant (23-53, 1952, 124A ff., 140A ff.), and also indicated that he would call Bornholdt as a witness in any event (47-48, 1953). Because Bornholdt's attorney stated that his client would assert his Fifth Amendment rights if called, the Court directed defendant not to place Bornholdt on the stand (48-51, 125A, 1953-1954). As a result, defendant was deprived of Bornholdt's testimony in general, and particularly was prevented from placing before the jury a written statement exonerating Victory, which Bornholdt had given his prior attorney shortly after arrest:

"Albert Victory had nothing to do with the shooting of the police officer on October 7, 1968 outside the club Arthur. I alone did the shooting because the police officer had clubbed [sic] me on the head and had pointed and fired his gun at me and Albert. Both Albert and I would have been killed by this police officer who had gone crazy and had clubbed [sic] me and Albert and he was going to shoot us" (130A).**

* Victory's attorney also elicited testimony from Bornholdt's psychiatric expert that under pressure Bornholdt would decompensate and engage in irrational, unpredictable, violent behavior (2079).

** At sentencing Bornholdt spontaneously volunteered another statement exculpating petitioner: "I would like to say that Albert Victory never knew I had the gun with me and I was insane at the time" (3511).

Victory even tried to obtain the testimony of the lawyer to whom Bornholdt had given the statement, but the Court would not permit it, in view of the privilege problem (2540-2544).*

At the close of his trial defendant requested that the jury be instructed that the prosecution had the burden of proof beyond a reasonable doubt with respect to the felony murder affirmative defense, expressly relying on the recently decided In re Winship, 397 U.S. 358 (1970), by submitting the following request to charge:

"3. Defendant requests for the record, that the Court charge, that the prosecution has the burden of proving beyond a reasonable doubt, that the accused, Albert Victory, has not satisfied the four elements of the "affirmative defense" set forth in the Revised Penal Law, Section 125.25(3). Defendant makes this request cognizant of the fact that the Revised Penal Law, Section 25.00(2) provides that the defendant has the burden of establishing such defense by preponderance of the evidence, but predicates this request on the submission that the Revised Penal Law, Section 25.00(2) violates due process in that it unconditionally shifts the burden of proof on a material issue in the case to the accused. See, Matter of Winship, ____ U.S. ____ (decided 3/31/70)." (3491)

The request was declined (2954), and the court charged, in accordance with a literal reading of the statutory provisions, that it was defendant's burden to establish the affirmative defense by a preponderance of the evidence (3057-3061), to which exception was taken (3093).

* The defense contended that the statement was given for the purpose of delivering it to Victory, and therefore was not privileged (2543).

The jury deliberated from 1:48 p.m. on April 16, 1970 (3096) to 11:38 p.m. the following day (3181). Its concern about the affirmative defense was apparent when it returned at 3:10 p.m. on April 17th with a request for further instructions on the law concerning the defense (3135). As noted above, at 9:19 p.m. it announced that it was deadlocked. It then deliberated until 11:38 p.m. before advising the court it had reached a verdict (3181-3184).

Proceedings after Conviction

Victory's conviction was affirmed by the Appellate Division, First Department, without opinion, 38 A.D.2d 689 (1st Dept. 1971) and by the New York Court of Appeals with an opinion reported sub nom. People v. Bornholdt, 33 N.Y.2d 75 (1973). Certiorari was denied, 416 U.S. 905 (1974). A motion for permission to re-argue and for reargument in the New York Court of Appeals based on the subsequently decided Mullaney v. Wilbur, 421 U.S. 684 (1975), was denied on June 15, 1976.

Victory then petitioned for habeas corpus in the district court on three grounds: (1) that he was denied due process by the shifting to him of the burden of persuasion with respect to the affirmative defense to felony murder, (2) that he was denied his right of confrontation by the trial court's refusal to permit impeachment of Francisco Garcia by showing that he had omitted any mention of Victory's kneeling of Officer Varecha in two statements given immediately after the incident, and (3) that he

was denied due process by the trial court's inadequate instructions on the meaning of the phrase "in the course of and in furtherance of" in the felony murder statute.

Judge Ward, in an exhaustive opinion, granted the writ on the due process issue raised by the inadequate instructions. He held, however, that the confrontation issue was either not of constitutional dimension or that it was harmless error. He declined to reach the issue raised by the shifting of the burden of proof on the felony murder affirmative defense. The superintendent of Green Haven has appealed.

Victory contends on this appeal that the district court's decision was correct on the instruction issue, but in any event must be affirmed on the other issues, Jaffke v. Dunham, 352 U.S. 280 (1957); Banks v. United States, 267 F.2d 535, 539 (2d Cir. 1959).

ARGUMENT

POINT I

THE DISTRICT COURT PROPERLY GRANTED THE PETITION ON THE GROUND THAT DUE PROCESS WAS DENIED BY THE REFUSAL OF THE TRIAL JUDGE TO EXPLAIN THE MEANING OF AN ELEMENT OF FELONY MURDER IN THE FACE OF REQUESTS BY COUNSEL AND AN INQUIRY BY THE JURY DEMONSTRATING ITS CONFUSION.

Judge Ward granted the writ on the ground that in the unusual factual situation of this case and the intricate legal issues raised by the theory of the prosecution, it was a denial of due process for the trial court to refuse to explain the significance of the phrase "in the course of and in furtherance of" the underlying felony. Appellant argues not that the district court was wrong in its legal analysis, but rather that it failed to take into account many statements by counsel and portions of the charge which, appellant claims, adequately informed the jury.

In view of this, there is no need to supplement the comprehensive review and painstaking exposition in Judge Ward's opinion except in briefest summary.

A killing does not constitute felony murder unless it occurs "in the course of and in furtherance of" the underlying felony. Where the underlying felony is the more typical one of robbery or burglary, the facts are usually self-evident, and the statutory phrase is unlikely to require explanation. In this case, however, there was no evidence from which any clear conclusion could be drawn as to when the escape -- the underlying

felony -- began. There was testimony of scuffling between Victory and the officer. After Bornholdt shot the officer he ran from the scene, followed a short time latter by Victory. But there was no communication between them indicating a joint plan to escape. On the contrary, the only words spoken were Victory's directions that Bornholdt stay out of the confrontation. Thus it is only by unsupportable inferences from the confused evidence that it could be found that there was a concerted plan to escape. There is even less basis in the record for determining when that escape began. It was as likely as not that Victory did not entertain the idea of leaving until after the officer had been shot, and after men with drawn guns approached. In that event he could not be guilty of felony murder. Cf. People v. Joyner, 26 N.Y.2d 106 (1970), in which the issue was whether the defendant's intent to rob his victim arose after the victim had been killed.

The jury was faced with a formidable task. The other issues before it -- the alleged assault on the officer, the arrest, the shooting, the escape, the affirmative defense and the insanity of Bornholdt -- each involved a multitude of facts and legal rules. Here, to a far greater degree than in a simple trial with few issues, it was essential that the jury have clear instructions in laymen's language relating the statute to the evidence.

Judge Ward carefully examined the statutory language in the context of the facts, and concluded that "in the course of and in furtherance of" required explanation. "For example, due to the absence of explanation of these terms, the jury may have erroneously

thought that because the shooting enabled Victory to escape, i.e., because his escape was furthered by the shooting, they could conclude that the shooting was 'in furtherance' of the escape," (84a) (emphasis in original).

Appellant argues that the jury was sufficiently informed on this element of felony murder because of statements concerning it made by counsel during the voir dire, the openings and summations, and by the judge in his instructions.*

To suggest that statements of law made by counsel during the voir dire are sufficient to cure an improper charge at the end of a trial many weeks later is a strange argument and patently unconvincing. Appellant tries to bolster his contention by stating that the first jurors chosen heard the statements of law 14 times and the last juror chosen heard them 3 times. This assumes that each juror, prospective as well as selected, listened attentively while other jurors were being examined, a proposition so improbable that it should be rejected out of hand.

Whatever effect the statements by counsel might have had on the jury, whether during the voir dire, openings or summations, was certainly undermined by the innumerable directions to the jury that it must take the law only from the judge. Typical is the examination of John Andes, who became the foreman. He was asked by Mr. Keenan, the prosecutor (VD 854):

* The argument that statements of counsel during the jury selection and in openings and summations might cure an inadequate charge is made for the first time on this appeal. It was not asserted in the state courts or in the district court.

"Q: Now, sir, you have heard many questions here about the law--some from Mr. Brown, some from Mr. Pollina. Is there anything about the law, the little bit that you have heard about the law as it apparently applies to this case, because it has been pointed out that the lawyers are not those who tell you what the law is and we don't bind you by what we say it is; it is what the Judge says the law is which makes the law, not us. Is there anything about that concept that --

A. No, sir, the Judge is supreme in law.

Q. And you agree with that?

A. Yes, sir."

And by Mr. Pollina, Victory's counsel (VD 857):

"Q: At this particular point you might have some questions in your mind as to what "reasonable doubt" is. All I can tell you is that that is a question of law which his Honor will instruct you about, and all of the questions of law will be decided by the Court."

And Mr. Pollina again (VD 861):

"Q: I mentioned just a short while ago that His Honor is going to instruct you as to the law, but your decision as to whether or not the law as given to you by the Court is consistent with the facts as you heard them from the mouths of witnesses is what controls. So when His Honor charges you at the conclusion of a trial, what you are doing is getting the framework within which to apply what you have heard. You are not getting any inference as to guilt or innocence. What you are getting is some structure with which to apply the facts that you have heard."

Some sharp exchanges, occurring throughout the course of the proceeding, could not have been missed. It should be noted that often those very explanations of law pointed to by appellant as proof that the jury had been sufficiently informed as to the elements of felony murder in this case were immediately preceded or followed by the explicit and unmistakeable warning that only the judge could instruct on the law. Noteworthy in this respect is the passage found at pages VD 1064-1067. And at the very end of his summation Victory's attorney was interrupted by the court (2846-2847):

"THE COURT: I think I will stop you at this point and not let you take over my duties.

MR. POLLINA: Thank you.

THE COURT: I will charge in accordance with what I believe the law to be and not what you believe to be the law.

MR. POLLINA: I assume that i going to be the same, Your Honor. I am sure it is going to be the same.

THE COURT: Well, I can't assume it, because it is my privilege and my duty to expound the law and not yours.

MR. POLLINA: I thank Your Honor. And in view of that Your Honor, I will say nothing further and I thank the Court and jury."

THE COURT: Have you concluded?

MR. POLLINA: Yes, I have Your Honor.

THE COURT: All right."

The jury, as is customary, was also repeatedly told that anything said was not evidence, which must have conveyed a similar meaning. Because these instances of advising the jury that they could take the law only from the judge were so numerous we note them only by page reference in the margin.* After those many reminders by the court, prosecutor and defense counsel that only the judge can instruct on the law, it would indeed be incredible if the jurors gave any heed to counsel's exposition. But if they were otherwise inclined to, the impact was further lessened by the court's repeated hostile and critical remarks addressed to Victory's trial attorney.** These certainly conveyed to the

* VD 64-65, VD 67, VD 73, VD 79-80, VD 83, VD 99-100, VD 148, VD 150, VD 159, VD 213, VD 230, VD 245, VD 249, VD 250, VD 256-257, VD 320, VD 308, VD 322, VD 347, VD 355, VD 362, VD 390, VD 393-394, VD 402, VD 408, VD 413, VD 415-416, VD 426, VD 452, VD 456, VD 470, VD 494, VD 532, VD 541, VD 555, VD 557-558, VD 562, VD 584, VD 586, VD 588, VD 590, VD 598, VD 599, VD 637-638, VD 641-642, VD 661, VD 664-665, VD 674, VD 686, VD 689, VD 690, VD 692, VD 735, VD 791, VD 819, VD 823, VD 825, VD 838, VD 840, VD 851, VD 857, VD 861, VD 880, VD 889, VD 968, VD 983, VD 986, VD 989, VD 991, VD 1011, VD 1031-1032, VD 1037 (court criticizes counsel), VD 1041, VD 1045-1047 (court criticizes counsel), VD 1065 (court criticizes counsel), VD 1067-1068, VD 1074, VD 1124, VD 1172, VD 1203, VD 1225, VD 1259, VD 1279-1280, VD 1288, VD 1301-1302, VD 1308, VD 1325, VD 1326, VD 1330, VD 1361, VD 1387, VD 1397, VD 1435, VD 1448-1449, VD 1458, VD 1465-1466, VD 1472, VD 1483, VD 1488, VD 1497-1498, VD 1538, VD 1539, VD 1543, VD 1567, VD 1575-1576, VD 1581, VD 1589, VD 1613, VD 1635, VD 1638, VD 1650, VD 1657, VD 1670, VD 1681, VD 1700, VD 1704, VD 1728, VD 1774, VD 1834, VD 1841-1842, VD 1852-1853, VD 1890-1892, VD 1909, VD 1921, VD 1928, VD 1936, VD 1942, VD 1946-1947, VD 1962, VD 1974-1977, VD 1990, VD 1994, VD 2001-2002, VD 2019, VD 2022, VD 2040, VD 2062-2063, VD 2072, VD 2090, VD 2099, VD 2103, 664, 1271, 1298, 1423, 2034, 2652, 2653, 2717, 2846, 2957, 3085.

** The remarks are found at 575, 597-598, 1209, 1271, 1415, 1423, 1424, 1426, 1450, 1455, 1565, 1592, 1943, 2030-2031, 2227, 2640-2641, 2643, 2652, 2731, 3128. The court's hostility was so pronounced that it was asserted as a ground for reversal in the appeal in the state court.

jury the notion that the court strongly disagreed with Victory's counsel on the legal issues which provoked the remarks, and this must have carried over in no small degree to every other statement of law made by him.

Beyond this is an even more compelling consideration: The statements of counsel upon which appellant relies were no more helpful to the jury's understanding than the bare statutory language. The fact that in some cases the statute was paraphrased to "during" the course of a felony (VD 552-543, VD 590-591, VD 845-846, VD 988-990, VD 1066, VD 1521) or "while" in the commission of the felony (VD 1521, VD 1946-1947, 2716) certainly did not clarify the issue, and other statements cited by appellant were directed at a different issue: whether or not Victory was guilty of the alleged escape (VD 542-543, VD 729-730, VD 1521).

The court's main charge did not make the issue any clearer. The several passages cited at pages 15-18 of appellant's brief do no more than repeat or paraphrase the statutory language. In some passages only the first part of the phrase, "in the course of" or its equivalent, was included but not "and in furtherance of", which was obviously of equal importance (2984, 3051, 3053).

Thus at the time the jury began deliberations it had no more understanding of one of the principal issues in the case than the words of art in which the statute was phrased. And those were complicated in several instances by the inclusion of "or of

immediate flight therefrom", which, as Judge Ward observed (73a) referred to the impossible situation of flight from an escape.

Counsel for Victory had submitted a simple, concise request to charge which would have eliminated all confusion on the point:

"In order for you to convict the accused, Albert Victory, of the crime of felony murder, you must find the prosecution has proven beyond a reasonable doubt that prior to or contemporaneous with the killing, Victory formed an intent to escape from the custody of the Patrolman and attempted to so escape, and that the killing occurred in the course of and in furtherance of that attempted escape.

"If the accused, Albert Victory, formed an intent to escape for the first time following the shooting and then fled from the scene of the shooting, he would not be guilty of felony murder and you must find him not guilty.

"If you have a reasonable doubt whether, prior to the shooting, Victory intended to escape from the custody of the Patrolman, you must acquit him of felony murder, the only crime charged in this indictment" (3489-3490).

The court, however, declined to charge it.

Any argument that the jury began its deliberations with adequate instructions is belied by the questions it sent to the court. Twice it asked for further instructions on the law of escape (3102, 3135), and each time counsel excepted to the court's failure to link the timing of the escape to the shooting (3110, 3148-3149). Finally, at 9:50 p.m. on the second day of deliberations (after once advising the court that it was deadlocked on

the felony murder charge, the jury presented the court with the question:

"As a matter of law, does the fact of flight after the shooting itself establish escape in the second degree after an arrest has been made for felony assault?" (3174).

This was an unequivocal indication that the jury had not found an escape in progress prior to the shooting. But the jury was clearly confused, it obviously had some awareness that the timing of the defendants' acts was important but was at a loss as to how that timing applied to the issues.

To controvert this clear explanation of the jury's question, appellant has concocted an improbable scenario: that the jury was not considering the felony murder issue when it asked the question. Being unable to reach a verdict on felony murder, appellant claims, it had turned its attention to the lesser crime of escape, and the question it asked was therefore unrelated to the felony murder charge.

There are four answers to that contention:

First, the crime of escape was the underlying felony and the basis for the felony murder charge, and had to be considered as part of the jury's deliberations about the more serious crime.

Second, had the jury at this point been interested only in the escape as the lesser included offense, as appellant contends, it would have promptly returned with a verdict on the crime of escape. There was never any question at trial but that Victory did leave the scene after the shooting. Appellant's version finds

no support in the record, for the events at trial can only lead to the conclusion that the jury's final question was a request for a clear direction on the very important issue of the timing of the escape and its relationship to the shooting of the officer.

The trial court itself apparently accepted this view: After telling the jury that, in determining the crime of escape, it made no difference "whether that flight takes place before or after the shooting, (3177-3178) and before paraphrasing the indictment charging felony-murder, it once more instructed the jury on the law of felony-murder relying on the language of the statute and including the phrase "or immediate flight therefrom." That phrase, (which had also been recited twice in the main charge (3053, 3057)), had no logical application to the underlying felony of escape, and undoubtedly had the effect of further confusing the jury as to the relationship between "flight" and "escape", and their significance in this case. As Judge Ward noted,

"The inclusion of 'or in immediate flight therefrom' may have confused the jury in that it may have suggested that immediate flight from the murder, as opposed to the underlying felony, would have been sufficient for felony murder purposes. That this may have been the jury's understanding is bolstered by their question * * * concerning the legal significance of 'flight after the shooting'"(91a, n.) (emphasis in original).

Indeed, Victory's counsel immediately excepted to the supplemental charge answering the question on the ground that the jury had been led to believe "that flight after the homicidal act would be sufficient for purposes of making out a felony murder" (3180). Appellant's attempt to lift this very telling question from its

proper context must fail. If the jury in fact was concerned only about escape when it asked, "does flight after the shooting itself establish escape in the second degree," then it had seriously misapprehended the elements of the two crimes, shifting the timing element of felony murder into escape and leaving its understanding of felony murder lacking that vital element.

Third, whatever may have been the exact state of comprehension of the jury, it was certainly confused, and it was the duty of the trial court to give a full explanation in answer to the question. By merely advising the jury that flight after the shooting did not determine whether an escape occurred, the judge left unanswered the question of what flight after the shooting did determine: innocence of felony murder.

Fourth, the repetition, in the court's response to the jury's question, of the language of the felony murder statute (3178) followed by a partial paraphrase of the same words (3179), which the jury had already heard several times prior to announcing its confusion, added nothing by way of clarification.

It is instructive to compare this case with Henderson v. Kibbe, ____ U.S. ____, 52 L.Ed.2d 203 (May 16, 1977). In Kibbe the Supreme Court held that habeas corpus should not have been granted in a case where the trial court failed to instruct the jury on the meaning of the word "causes" in a different portion of New York's murder statute, Penal Law §125.25, subd. 2. In

Kibbe however, the issues before the jury were few and simple. The word "causes" is one of ordinary usage and easily understood. No request to charge had been made and there was no indication that the jury was at all confused. These factors are poles apart from the comparable ones in this case. Kibbe, therefore, provides no basis for reversal here.

Albert Victory's conviction by a jury which was inadequately charged and which expressed its confusion about a critical issue, over repeated pleas by defense counsel for a simple instruction which would have fully explained the issue, was so lacking in fundamental fairness that he was deprived of due process of law.

POINT II

VICTORY'S RIGHT OF CONFRONTATION WAS DENIED BY THE TRIAL COURT'S REFUSAL TO PERMIT IMPEACHMENT OF THE PRINCIPAL PROSECUTION WITNESS.

The trial court's rulings which prohibited impeachment of Francisco Garcia's testimony are additional and alternative grounds for affirmance of the district court's grant of the writ.

A crucial element in the intricate theory of the prosecution was the purported kick in the groin delivered by Victory to Patrolman Varecha. Unless that specific fact were proved the entire felony murder case would collapse. It was that kick which made the subsequent arrest one for a felony, so that the flight could be characterized as an escape from an arrest for a felony and therefore escape in the second degree, one of the nine felonies specified in the felony murder statute.

Francisco Garcia's vivid testimony that he saw Victory assault the policeman, complete with an in-court demonstration (1042-1043), must have been received by the jury as strong evidence of the act. Yet the materials turned over to the defense (pursuant to People v. Rosario, 9 N.Y.2d 286 (1961), New York's equivalent of the Jencks Act, 18 U.S.C. §3500) showed that within a few hours of the incident Garcia gave two detailed statements, one to the investigating detective, the other to an assistant district attorney. In neither statement did he mention that the officer had been kneed.

Victory sought to impeach Garcia's testimony by showing his failure to mention the alleged assault in the two statements, but the attempt was frustrated. The trial court refused to permit petitioner to elicit the facts on cross-examination of Garcia; it refused to permit introduction of the statements through Garcia, the detective, the stenographer who took down and transcribed the interview of Garcia by the district attorney, or the district attorney himself.

The issue presented here is whether the failure of a witness to mention a material fact in a prior statement is a prior inconsistent statement which may be used to impeach the witness who testifies at trial to the existence of the fact, and whether refusal to permit such impeachment violates the Sixth Amendment right of confrontation.

The generally accepted rule of evidence is that stated by Wigmore §1042 (Chadbourn Rev. 1970);

"A failure to assert a fact, when it would have been natural to assert it, amounts in effect to an assertion of the non-existence of the fact. This is conceded as a general principle of evidence * * * . There may be explanations * * * but the conduct is 'prima facie' an inconsistency."

To the same effect is McCormick, Evidence (2d Ed.) §34. And see Wharton's Criminal Evidence (13th Ed.) §470; United States v. Standard Oil Company, 316 F.2d 884, 891-892 (7th Cir. 1963); United States v. Cordova, 421 F.2d 471 (9th Cir. 1970), cert. denied 398 U.S. 941.

The Supreme Court stated the rule in Jencks v. United States, 353 U.S. 657, 667 (1957), when it defined the role of a prior omission in impeachment:

"Flat contradiction between the witness' testimony and the version of the events given in [the prior statement] is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony."

The court below reached the same conclusion (70a).

That the issue is one of constitutional dimension was recently decided in Chesney v. Robinson, 403 F. Supp. 306 (Conn. 1975), aff'd. on opinion below, 538 F.2d 308 (2d Cir. 1976), cert. denied, 429 U.S. 867.

In Chesney a petition for habeas corpus was granted in an attack on a state murder conviction. At trial a witness had testified that the mortally wounded victim told him he had been shot by the defendant. The defense was denied the opportunity to show that the witness had not testified to that accusation in testimony before the grand jury.

In some cases there have been strong policy reasons to justify the exclusion of the impeaching evidence: In Chesney there was the countervailing rule of secrecy of grand jury proceedings; in Davis v. Alaska, 415 U.S. 308 (1974), the state had an interest in maintaining the confidentiality of juvenile delinquency adjudications. Yet in each case the right of confrontation prevailed.

Here there is no countervailing policy of any kind. The only basis for exclusion was a restrictive state rule of evidence*, cf. Chambers v. Mississippi, 410 U.S. 284 (1973), which held that a state's common law evidentiary rules would not be permitted to justify a limitation of the rights which are essential to a fair trial. No possible prejudice would have been suffered by the prosecution by permitting the impeachment which petitioner sought to utilize. If facts were available to explain, mitigate or qualify the effect of the omission in the prior statements, they could have been presented to the jury by the prosecution.

An added factor increased the prejudice suffered by petitioner in the instant case. In laying a foundation for the anticipated impeachment, defense counsel asked the witness if he had stated to the detective and to the district attorney that Victory had kned the officer in the groin. In each case the witness responded that he thought that he had (1187-1188, 1282). When the trial court unexpectedly excluded the impeaching evidence the jury was left with the totally erroneous impression that the prior statements were consistent with the trial testimony, in effect bolstering the prosecution case, Davis v. Alaska, supra, at 318, as Judge Ward noted below.

* Ironically, the issue was one of first impression in Bornholdt, and the court relied, among other authorities, on Wigmore §1042, which, of course, is to the contrary, 33 N.Y.2d at 88-89.

Judge Ward, after thorough consideration of the issue (67a-71a), concluded that the limitation on confrontation was serious error, but that it did "not rise to a constitutional level or else despite constitutional error it was harmless beyond a reasonable doubt" (71a).

Because we believe this conclusion to be incorrect, it is pertinent to examine the nature of Garcia's pre-trial statements and the role of his trial testimony in convincing the jury that Victory kneed the officer in the groin.

Garcia's pre-trial statements were reflected in 5 writings:

1. Handwritten notes of an interview conducted by Detective Byrne 2:15 a.m.* October 7, 1968 shortly after the incident (17a).
2. A typed revision of Detective Bryne's notes (22a).
3. A stenographically recorded question - and - answer interview by Assistant District Attorney Dannett, taken at 4:45 a.m. on October 7, 1968 (24a).
4. Garcia's grand jury testimony (36a).**
5. Handwritten notes taken by Mr. Dannett of an interview with Garcia (13a).***

* The notes bear the notation that they were made at 2:15 p.m., but it was conceded in the District Court that this was erroneous and that 2:15 a.m. was intended.

** The record does not indicate the date of Garcia's testimony before the grand jury. Of necessity it must have been at a later date. Counsel is advised that the District Attorney's office has no record of the exact date, but that it was probably during the last week of October, 1968.

*** Judge Ward's opinion recites that these notes are "dated October 7, 1968" (65a). As will be discussed below, the record is not clear when these notes were made, and it appears that they were most probably recorded in preparation for Garcia's grand jury testimony rather than on the morning of the incident.

The Bryne statements, which are essentially a verbatim transcription of Garcia's account, do not refer in any way to Victory's kneeling the patrolman in the groin. They show the contrary. The handwritten version, obviously written in haste, states:

"I jumped on tan guys [Bornholdt] back & the tan one struck him & kicked him in the groin & the tan one said mind your own business -- and get the hell out of here" (19a).

The typewritten version, which corrects some details and adds bits of the account the detective apparently recalled but was unable to get into his handwritten notes, recites that part of the event with the pronoun "him" changed to "me":

"I jumped on the tan guys back and the tan one struck me and kicked me in the groin and about my body several times and said mind your own business and get the hell out of here" (23a).

It would appear that in his rush to get the statement on paper, the detective had a momentary lapse in his stating the account in the first person as Garcia was relating it. In reviewing the correcting his notes while typing them, he noticed the error and corrected it.

The clear meaning of the statement can only be that it was Garcia himself who was kicked in the groin, and this is borne out by his testimony to the grand jury exactly to that effect (47a), his stating to Mr. Dannett that "he kicked me several times" (29a), and his trial testimony (1130).

Appellant argued in the district court that Garcia's statement to Detective Byrne must be read as stating that it was the patrolman who was kicked in the groin. If indeed there was a factual issue, it was one to be presented to the jury for resolution. Because of the trial court's rulings the jury was not ever aware of the contents of the statement.

More important than the question of whether Garcia or the patrolman received the kick is the fact that Garcia unequivocally stated to Byrne that Bornholdt, not Victory, did the kicking, and that the statement omits any mention of Victory kneeling the officer.

The stenographically-transcribed statement Garcia made to Assistant District Attorney Dannett at 4:45 a.m. is totally silent as to any kick delivered by Victory, although it described every other aspect of the incident in great detail.

The handwritten notes taken by Mr. Dannett (13a-16a) are sketchy and lacking in detail. They do, however, include "ptl kicked & holding himself in groin kicked in scuffle w/stick." They are silent as to who did the kicking. These notes are the first writing which indicates that Garcia claimed to see the officer kicked. On the upper right hand corner of the first page (13a) appear the figures "10/67". These presumably refer to a date: from the night of October 6th to the morning of October 7th. The question is whether that is a reference to the date of the events described or the date the notes were made. Judge

Ward, in his otherwise meticulous opinion, assumed them to be the date the notes were made, but we believe that assumption to be unjustified. It is certainly common practice when dating instruments to set forth a single day -- the day of execution. It is most unusual, if not unheard of, to date a writing with two days, one of them the day prior to execution. On the other hand, when describing events taking place about midnight it is customary to refer to "the night of October 6-7", and in the light of everyday experience this would appear to be what Mr. Dannett was doing. It was the understanding of the defense at trial that Dannett's notes were made while interviewing Garcia immediately prior to his grand jury appearance several weeks after the incident.

The record contains only a bit of testimony relating to this matter. On cross-examination of Garcia, defense counsel asked, "Isn't that the fact, that you never mentioned any kneeling or kicking until the time that you were called to testify before the Grand Jury?" The prosecutor objected, and at a sidebar conference called the court's attention to Dannett's handwritten notes referring to the officer's being kicked. The record does not contain a ruling on the objection, but apparently it was overruled and counsel asked to have the question repeated. Instead the court stated that it wished to clarify the matter and the following occurred:

THE COURT:* * * Is it a fact that before you went before the Grand Jury you told Mr. Dannett, the District Attorney, who is sitting right in front of you, that the policeman had been kicked in the groin?

THE WITNESS: Yes.

THE COURT: Is that true?

THE WITNESS: That is true?

* * *

THE COURT: And did Mr. Dannett put it down on a piece of paper, do you know?

THE WITNESS: I think so. He was writing.

THE COURT: I see, all right. This is before you went before the Grand Jury?

THE WITNESS: Yes sir." (1287-1288)

The only suggestion that the notes were made the night of the incident occurred during colloquy in which the prosecutor stated that the notes were "taken in the police station that night" (1301). The argument that Dannett's notes were made immediately after the incident leaves unexplained how, with the knowledge that the officer had been kicked in the groin, he could possibly have failed to elicit the details in the formal statement he took from Garcia. If, in the face of Garcia's sworn testimony, a factual issue remained as to when Dannett's notes were taken, it was for the jury to resolve, just as it should have been a jury question whether the pronoun in Detective Bryne's notes referred to Garcia or the patrolman.

Whatever issue may exist as to when Garcia first stated that the officer was kicked in the groin, it is indisputable that it was not until his grand jury testimony, several weeks after the events, that any statement by Garcia accused Victory rather than Bornholdt of the kick.

The evidentiary rule, as stated by Wigmore §1042, is that an omission constitutes an inconsistent statement if the fact omitted was one which would have been natural to assert. Certainly the kick was such a fact. The kneeling of any man in the groin, causing him to double over in pain, is a dramatic event. When the man is a uniformed policeman the magnitude of the incident is vastly greater. And when the officer's response is to club the aggressor and his companion causing blood to flow profusely from their heads, then it can hardly be doubted that the kneeling must have been the most memorable aspect of the incident prior to the shooting.

Judge Ward recognized the fundamental role of confrontation in criminal trials and stated it eloquently (67a-71a). Yet he held that the trial court's limitation did not require granting the writ. This was because "a number of factors tended to undercut the potential effect of such impeachment" (71a). These factors will be discussed seriatim:

1. "The jurors would also have had before them Dannett's handwritten notes in which the kick was mentioned."

We have already discussed the fact that Dannett's notes were probably made some weeks after October 7th, in preparing Garcia's Grand Jury testimony, and that in any event they omit any mention of Victory as the assaulter. Undoubtedly, had the defense been permitted to show the omission in the Byrne notes and the Dannett stenographic transcript both made the night of the incident, the prosecution could have used any proper device to explain, or mitigate the effect of the impeachment. Whether Dannett's notes or his testimony would have convinced the jury is not a question for the Court. The same possibility for explanation was available to the prosecution in every case in which the right of confrontation was held to be violated. This does not detract from the basic right of a defendant to place impeaching evidence before the jury.

2. "Garcia's wife also testified to the kneeling incident, and Theresa Gentry and Maureen LaGuardia testified that they saw the Patrolman crouching over."

Francisco Garcia was the only witness who testified in any detail about the kneeling. Mrs. Garcia was the only other witness who claimed to have observed it, but she was unable even to describe the position of the parties and several other notable details of the incident. The testimony of Theresa Gentry and Maureen LaGuardia that the patrolman was in a crouch was of little probative value. Unquestionably the officer believed he

was being attacked and was in a defensive position.* The attempted impeachment of Francisco Garcia would have served to explain any implication in the Gentry-LaGuardia testimony that the crouch was caused by pain.

3. "The overall cross-examination was lengthy and did include readings from selected portions of the pre-trial statements regarding other matters."

That the defense was generally permitted broad cross-examination on other matters cannot compensate for its limitation in this most crucial area.

4. "With respect to the Bryne statements, had defense counsel juxtaposed a reading of the precise impeaching matter with the foundation he had laid it is reasonable to conclude that the judge would have allowed it."

In answer to foundation questions, Garcia gave equivocal answers: e.g., when asked "Did you ever tell Detective Bryne in the precinct or in the early morning hours on October 7th, 1960 that Albert Victory kneed or kicked the police officer?", Garcia replied, "Yes, I think I told him." However an objection was sustained to the question "Do you see it anywhere in the statement?" (1187-1189). The logical procedure would then have been to introduce the entire statement into evidence, and the defense

* Victory in his verified petition for habeas corpus filed in the District Court stated, "The patrolman advanced toward me, in what I would describe as an offensive-defensive crouch, not bent over in pain, as described in some of the testimony" (7a).

tried to do just that. It is not clear what Judge Ward meant by suggesting that counsel might have "juxtaposed a reading of the precise impeaching matter with the foundation he had laid," since it was the omission or any reference to a kick by Victory which counsel sought to adduce. Moreover, while hindsight might reveal possible alternatives available to defense counsel in his attempt to establish this glaring omission, it is now fruitless to conjecture what the trial judge would have done in other circumstances. We do know what the trial judge did in response to an attempt to use one legitimate mode of impeachment.

5. "With respect to the Dannett transcript, it appears that the judge's ruling resulted in part from impatience with the lengthy and inartistic cross-examination, highlighted by defense counsel's insinuation -- that Garcia never mentioned the kneeling incident prior to the Grand Jury."

That the judge was impatient with defense counsel throughout the trial is clear. The judge's hostility was the basis for a mistrial motion (Tr. 1593-1594) and was a ground for the state court appeals.* The record shows that the trial atmosphere was so frustrating that any lapse from elegance is understandable. In any case, even justified irritation on the part of the trial judge cannot excuse a deprivation of a fundamental right. The

* References to the court's hostile remarks are set forth in the footnote on page 23 above.

suggestion by defense counsel that Garcia never mentioned the kneeling prior to his appearing to testify before the Grand Jury was not only made in good faith, but, as shown above, more than likely true.

The impeachment of Garcia's testimony that he had seen the kneeling would have had notable impact, because there was other evidence in the record which made it doubtful that the act occurred. Mr. Garcia and Maureen LaGuardia both testified that after the violent kick which caused the officer to double-up in pain, Victory continued repeating, "Listen, I want to help you. I don't want any trouble. Come on." (LaGuardia 855-56, 867-868, 976, 989), and "Give me a break" (F Garcia 1052). Mrs. Garcia's testimony was that after being kicked, Patrolman Varecha said, "Please * * * just give me your driver's license" (D Garcia 1340). It strains credulity that a man who has just brutally kicked a policeman in the groin would say to his victim that he wants to help and doesn't want any trouble. It is equally incredible that the injured officer would politely ask for the aggressor's driver's license. Similarly, it is difficult to believe that the patrolman, bent over in pain from a disabling kick to the most sensitive part of his body would have been able to mobilize the strength to club both Victory and Bornholdt so hard that blood flowed profusely from their heads.

In recent years the Supreme Court has on three occasions stated flatly that denial of effective cross-examination is "constitutional error of the first magnitude and no amount of

showing of want of prejudice would cure it," Brookhart v. Janis, 384 U.S. 1, 3 (1966); Smith v. Illinois, 390 U.S. 129, 131 (1968); Davis v. Alaska, 415 U.S. 308, 318 (1974). See also, United States ex rel. Santiago v. Vincent, 423 F. Supp. 103, 109 (S.D.N.Y. 1976), aff'd, 553 F.2d 94 (2d Cir. 1977). Even if a stringent harmless error test were to apply, the writ would have to issue. The error deprived the jury of important facts affecting a crucial issue in a close case. It was not only of constitutional magnitude, but was far from harmless.

POINT III

DUE PROCESS REQUIRES THAT THE PROSECUTION
DISPROVE THE AFFIRMATIVE DEFENSE TO FELONY
MURDER BEYOND A REASONABLE DOUBT.

The affirmative defense to felony murder in New York Penal Law §125.25, subd. 3, provides that a defendant shall be acquitted if the jury finds that he a) did not himself cause the death or "solicit, request, command, importune, cause or aid the commission thereof", b) "was not armed with a deadly weapon," c) had no reason to believe that any other participant was armed, and d) "had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury." Pursuant to Penal Law §25.00, subd. 2, a defendant must prove the affirmative defense by a preponderance of the evidence.

In the district court Victory argued that under In re Winship, 397 U.S. 358 (1970) and Mullaney v. Wilbur, 421 U.S. 684 (1975), due process was denied by the shifting to him of the burden of proving the defense. With remarkable prescience, Judge Ward refrained from ruling on this contention, for at the time of his decision Patterson v. New York, ____ U.S. ____, 53 L.Ed.2d 281 (June 17, 1977), was pending undecided in the Supreme Court. The subsequent decision in Patterson casts a new light on some aspects of Mullaney, but it does not negate the argument that Winship and Mullaney mandate the granting of the writ in this case.

Winship, of course, held that due process requires proof beyond a reasonable doubt in criminal prosecutions. Mullaney held that due process was denied a defendant by the Maine law which required him to prove by a preponderance of the evidence that he acted under "heat of passion on sudden provocation" in order to reduce a murder charge to one of manslaughter. In Patterson, the Court declined to extend the rule to New York's affirmative defense of "extreme emotional disturbance" which a defendant must prove by a preponderance of evidence to reduce a murder charge to manslaughter. It reasoned that under New York law the prosecution was required to prove all elements of the crime of murder. That much is mandated by due process. Extreme emotional disturbance, however, is a "separate issue" from guilt of murder and, like the issue of insanity, Leland v. Oregon, 343 U.S. 790 (1952); Rivera v. Delaware, 429 U.S. 877 (1976), the burden of proof may be placed on a defendant, 53 L.Ed.2d at 290. The court, in analogizing extreme emotional disturbance to insanity, noted that the New York Court of Appeals had characterized the affirmative defense as permitting "the defendant to show that his actions were caused by a mental infirmity not rising to the level of insanity", id., quoting People v. Patterson, 39 N.Y.2d 288, 302 (1976). By placing extreme emotional disturbance in the same category as insanity, the Court was adopting the reasoning of Mr. Justice Rehnquist's concurrence in Mullaney, 421 U.S. at 704, in which he expressed the view that "the existence or

non-existence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime," id., at 706.

Patterson thus stands for the proposition that the prosecution must still prove every element of a crime, but if a state chooses to permit consideration of mitigating factors the burden may be placed on a defendant to prove their existence, if proof by the prosecution "would be too cumbersome, too expensive, and too inaccurate," 53 L.Ed.2d at 291. The court clearly indicated that it was not permitting the burden to be shifted to defendants with respect to every factor which might be labeled an affirmative defense. It stated only that it "decline[d] to adopt as a constitutional imperative, operative country-wide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused," 53 L.Ed.2d at 292.

Applying the reasoning of Patterson, the first step in deciding whether a defendant may be required to assume the burden of proof on any issue is to determine whether the facts to be proved constitute an element of the crime or simply a mitigating circumstance. With regard to the felony murder affirmative defense that question has already been answered by the New York Court of Appeals, and it is axiomatic that the state court's interpretation of the statute is binding on the federal courts, Mullaney v. Wilbur, 421 U.S. at 691. In People v. Bornholdt, 33

N.Y.2d at 85, the state court said of the felony murder defense:

"Unlike the defense of entrapment, which merely interposes a bar to prosecution, a defendant's claim for exoneration under the statutory defense before us goes, in the final analysis, to the guilt -- the rightness of punishing the accused. It recognizes, in effect, the unjustness of imposing criminal liability for consequences as to which there is no culpable mental disposition on the part of the accomplice defendant."

That is an unequivocal holding that the defense involves an element of the crime in the traditional sense: It negates the guilt of the defendant by establishing a lack of intent -- "no culpable mental disposition".

Prior to the revision of New York Penal Law in 1965, New York's formulation of felony murder followed the common law and did not include any element of intent. The common law formulation had provoked great criticism over many decades, both because of the philosophical problem of punishing unintended acts and the related policy reason that no public interest is served by such punishment.* The traditional goals of deterrence, retribution and rehabilitation cannot be furthered except where punishment relates to volitional acts. For these reasons the court have

* See, e.g., Hall, GENERAL PRINCIPLES OF CRIMINAL LAW (2d Ed. 1960) 548; Byrn, Homicide Under the Proposed New York Penal Law, 33 Fordham L. Rev. 173, 191-199 (1964); Gegan, Criminal Homicide in the Revised New York Penal Law, 12 N.Y. Law Forum 565, 586-590 (1966); Preveser, The English Homicide Act, 57 Colum. L.Rev. 624, 634 (1957); Model Penal Code, Tent. Draft No. 9 (1959) 33, 36-38. In England the crime of felony murder was abolished in the Homicide Act of 1957, 5-6 Eliz, 2, c. 11. This case is a disheartening example of the injustice of felony murder: Victory has been convicted of murder on the basis of vicarious liability for the unforeseeable, irrational act of his psychotic companion.

repeatedly struck down criminal statutes which omit an element of intent, e.g. Lambert v. California, 355 U.S. 225 (1957); Smith v. California, 361 U.S. 147 (1959); United States v. Mancuso, 420 F.2d 556 (2d Cir. 1970); People v. Munoz, 9 N.Y.2d 51 (1961), or have construed such statutes to include an element of intent, Morrisette v. United States, 342 U.S. 246 (1952). The absence of intent in felony murder, however, was justified by use of a fiction:

"[A] felonious homicide is made murder in the first degree by operation of the legal fiction of transferred intent * * *. It is the malice of the underlying felony that is attributed to the felon," People v. Wood, 8 N.Y.2d 48, 51 (1960).

It was in this context that New York enacted the revised Penal Law with its affirmative defense to felony murder. The defense restructures the crime by incorporating an element of intent. Although the statute does not set forth the facts to be proved in the customary language defining elements of the crime, a reasonable analysis demonstrates that the New York Court of Appeals was correct in labeling them as negating intent and therefore elements of the crime in the most traditional sense. This is clear when the defense is compared to entrapment (as the court did in People v. Bornholdt, supra), to insanity, Leland v. Oregon, 343 U.S. 790 (1952); Mullaney v. Wilbur, 421 U.S. 684, 704 (Mr. Justice Rehnquist, concurring); Rivera v. Delaware, 429 U.S. 877 (1976), and the extreme emotional disturbance defense

in Patterson. In each of those situations, the facts to be proved under the defense do not relate to any traditional element of the crime, but rather to collateral circumstances. In the felony murder defense the facts to be proved go to the heart of the defendant's intent in performing the acts constituting the crime.

It has been argued that it is not unfair to shift the burden of proof to a defendant where the facts in issue are peculiarly within his knowledge. Thus the New York Court in Bornholdt noted, 33 N.Y.2d at 84, that the prosecution must adduce sufficient evidence to sustain the accusation, and then stated:

"Beyond this, a point is perceived where it becomes fair to call upon the defendant to prove his claim of defense, as where there is a 'manifest disparity in convenience of proof and opportunity for knowledge'. (Morrison v. California, 291 U.S. 82, 91; see, also, People v. Laietta, supra [30 N.Y.2d 68] , at p. 75."

Superficially it might appear that proof of the affirmative defense in this case would have been easily within Victory's capacity. Yet, when we look at the facts to be established and the limited ways of proving them, it is obvious that the burden was an unreasonable one which in reality could never be met.

To prove the defense, the defendant must convince the jury that he

"(a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and

(b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

(c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article, or substance; and

(d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury."

It is immediately apparent that the defense requires a defendant to assume the burden of proving that he is innocent of several crimes. Thus, to meet the demand of subdivision (a), he must prove that he is not guilty of murder of manslaughter, either as the killer or as an aider and abetter of the killer.* Subdivision (b) requires him to prove his innocence of the crime of possession of a weapon, New York Penal Law §§265.01-265.03. To prove lack of knowledge that his accomplice was armed under subdivision (c) requires the same evidence which would have to be shown to prove he was not guilty as an accomplice to his companion's crime of weapons possession.

Proof of the facts underlying subdivision (d) -- that the defendant had no ground to believe his companion would engage in violence -- imposes a particularly offensive burden. There can

* This creates a further problem in that it requires instructions which are inherently confusing. The clause "Did not * * * solicit, request, command, importune, cause or aid" is almost verbatim the negative of the language of Penal Law §20.00 defining liability for the conduct of another. Because the defense only applies where an accomplice was the killer, §20.00 must be charged with respect to the underlying felony, as the trial court did in this case (2966-2970). The jury, burdened with the task of trying to understand the convoluted theory of the prosecution, was faced with the need to determine whether the prosecution had proved Victory an accomplice of Bornholdt beyond a reasonable doubt with respect to the escape, and also whether Victory had proved by a preponderance of the evidence that he was not an accomplice of Bornholdt in the shooting. Because the escape and the shooting were inextricably connected, the jury could not possibly be expected to grasp the fine distinction.

be no guilt of felony murder unless the killing is in furtherance of the underlying felony. New York law has long been that if a killing is "for a reason personal to [the killer] and unrelated to the [felony]" a conviction for felony murder must be reversed, People v. Elling, 289 N.Y. 419, 422 (1943); cf. People v. Sobieskoda, 235 N.Y. 411, 416-417 (1923); People v. Ryan, 263 N.Y. 298, 303 (1934). Proof by a defendant that he did not believe his companion would engage in violence requires exactly the same evidence that would establish the killing to have been for a personal purpose unrelated to the felony. The defendant must therefore prove his innocence of felony murder to establish the affirmative defense. In addition, under the unusual circumstances of this case, proof of the same facts -- that the defendant had no ground to believe his companion would engage in violence -- would have established his innocence of felony murder in another aspect: It would have established that Victory was not guilty of the underlying felony of escape. This is because the two men were under arrest by an officer armed with his nightstick and a drawn revolver. Unless the officer were overcome by force there was no possibility of a successful escape. It was only the shooting of the officer which made an escape possible. If Victory had no reason to believe Bornholdt would engage in violence he could not have been guilty of escape.*

* This analysis is particularly compelling in view of the total lack of any direct evidence of a joint plan to escape. The only communication between Victory and Bornholdt was the repeated request by Victory that Bornholdt stay out of his discussion with the officer.

Thus, to establish the facts necessary for an acquittal by reason of the affirmative defense, Victory was called upon to prove his innocence of the very crime charged and other crimes as well. Whatever facts a criminal defendant may properly be called upon to prove, innocence of crime is certainly not among them, Speiser v. Randall, 357 U.S. 513 (1958).

Beyond the nature of the facts to be proved, moreover, is the manner in which they can be proved. Only two sources were available to Victory: His own testimony and that of Bornholdt. An application to limit his cross-examination as to prior crimes in accordance with "recent federal cases", presumably Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965); United States v. Palumbo, 401 F.2d 270 (2d Cir. 1968), was summarily denied (2233-2234),*and Victory did not testify.

It is intolerable to place on a defendant the burden of proving any issue without removing the barrier to his testifying posed by the common law rule of evidence permitting impeachment by means of prior crimes. This issue has not been considered by the courts in the context of affirmative defenses. In terms of rebutting presumptions, however, it was recognized in Tot v. United States, 319 U.S. 463, 470 (1943):

* The trial took place prior to the decision in People v. Sandoval, 34 N.Y.2d 371 (1974), which approved a procedure for a pre-trial motion to exclude cross-examination of a defendant as to certain prior crimes. Even under Sandoval standards, however, it seems clear that few crimes will be excluded.

"If the presumption warrants conviction unless the defendant comes forward with evidence in explanation and if, as is necessarily true, such evidence must be credited by the jury if the presumption is to be rebutted, the defendant is under the handicap, if he takes the witness stand, of admitting prior convictions of violent crimes. His evidence as to acquisition of the firearm or ammunition is thus discredited in the eyes of the jury before it is given."

The leading commentators have urged that where a defendant has the burden of going forward to adduce evidence to rebut a presumption, he "should enjoy severe limitations upon being cross-examined" if he testifies, Ashford and Risinger, Presumptions, Assumptions and Due Process in Criminal Cases, 79 Yale L.J. 165, 176 (1969). Yet the burden on a defendant facing a presumption is far less than that of a defendant seeking to establish an affirmative defense. Where a prosecution case rests on a presumption, the burden of proof does not shift. The only burden of the defendant is to adduce some evidence in rebuttal. The jury is then instructed that the burden of proof remains with the prosecution to establish the fact presumed and that the jury may (but need not) infer the fact presumed from the evidence before it.

The New York Court of Appeals casually dismissed the notion that forcing a defendant to testify raised a serious constitutional problem. It stated that shifting the burden of proof to a defendant:

"imposes no undue hardship or oppression. The fact that some pressure may thereby be exerted on the defendant to testify would not itself seem to establish unfairness. (See Yee Hem v. United States, 268 U.S. 178, 185)." 33 N.Y.2d at 85.

Yee Hem (and the cases following it, e.g. Barnes v. United States, 412 U.S. 837, 846-847 (1973)) dealt not with an affirmative defense, but with the rebutting of a presumption. Where a presumption is relied upon, the fact presumed must flow from the facts adduced by a standard at least as strigent as more-likely-than-not, Leary v. United States, 395 U.S. 6 (1969) and probably as demanding as beyond a reasonable doubt, Barnes v. United States, supra at 843; Franklin v. Conway, 546 F.2d 579, 581 (4th Cir. 1976). The facts in issue in the felony murder affirmative defense are not inferable from those the prosecution must adduce to prove its case. To prove the defense by a preponderance of the evidence, Victory had to testify or obtain the testimony of his companion Bornholdt, or both.

As to the testimony of Bornholdt, Victory had moved before trial for a severance (and renewed the motion several times during the trial) in the expectation that Bornholdt would be willing to testify at a trial in which he was not a defendant. The motion was denied. Victory sought to call Bornholdt as a witness, but when it was made known that Bornholdt would refuse to testify on Fifth Amendment grounds, the trial court refused to permit him to be called. As a result Victory had no choice but to rest his defense on evidence appearing in the prosecution case. The record of the jury deliberations indicates that this was almost enough: the jury was obviously troubled. It requested further instructions about the affirmative defense and later announced it was deadlocked before finally reaching a verdict.

By casting the burden of persuasion on the defendant who asserts an affirmative defense, but not providing for any limitation on cross-examination of a defendant about his past criminal record, New York's statutory scheme effectively, albeit unintentionally, prevents defendants with criminal records from utilizing those defenses. The result is that defendants who should be acquitted on an objective appraisal of the facts will be convicted. The risk of erroneous conviction is a matter of great concern in assessing the propriety of shifting the burden of proof, Mullaney v. Wilbur, supra at 701. Where a defense involves only a mitigating factor, this concern is of lesser moment, Patterson v. New York, supra, 53 L.Ed.2d at 291. But the affirmative defense to felony murder serves no mere mitigating function. It completely exculpates a defendant.

CONCLUSION

THE DISTRICT COURT'S ORDER GRANTING A WRIT
OF HABEAS CORPUS SHOULD BE AFFIRMED.

Respectfully submitted,

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